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CHECKS.

(Second sub-division.)

BANK'S RIGHT TO RECOVER MONEY PAID ON FORGED CHECKS.

In 1802 it was decided that money paid on a forged check, that is, a check to which the drawer's name was forged, by the bank on which the check was drawn, could not be recovered back from the innocent person to whom it made the payment. W had a deposit in the bank. A check for $2,600 purporting to have been drawn by W in favor of T, or bearer, was presented to the bank prior to 1 o'clock, P. M., August 3d, 1798, by L, and was entered by the receiving teller to L's credit in his bank-book, as cash. It was likewise entered in the scratcher and cash book, was credited to L and charged to W. Between 3 and 4 o'clock P. M. of the same day, the bank discovered that the check was a forgery. The bank erased the credit to L and the charge against W. L was promptly notified. In a suit by L to recover the amount of this check, $2,600, as deposited with the bank, it was held that he could recover. The acceptor of a bill is, says Shippen, C. J., bound at the time of acceptance to know whether the signature to it is genuine or not; he "takes this knowledge on himself." The same principle applies to the payment of a bill or check, by the drawee. Hence, L could recover though payment was made only by the entry of a credit to L, and although the notice to him of the forgery was given within three or four hours.[1]

[1]Levy v. Bank of United States, 1 Binn, 27.

THE ACT OF APRIL 5, 1849.

The 10th section of the act of April 5, 1849,[2] enacts that whenever any value or amount shall be received as a consideration for the negotiation, or in payment of any check, etc., by the holder, from the endorsee, payer, and the signature of the drawer, etc., shall have been forged thereon, such endorsee or payer, may recover back from the person previously holding or negotiating the same, the value or amount given or paid, with lawful interest from the time that demand shall be made for repayment. The rule in Levy v. Bank of the United States, was assumed by Read, J., to be the rule in Pennsylvania, until the passage of the act of 1849,[3] although it was supposed to be later discovered that that act was but declaratory of the commcn law.[4] Since that act was passed, the mere giving of credit, on its books, to one who presents a forged check drawn upon it, does not preclude it, on the discovery of the forgery, from cancelling the credit;[5] nor does the fact that the bank has actually paid the money to the holder of the check, prevent its being recovered back, if the holder, being agent for another, still has the money.[6]

NEGLIGENCE.

The paying bank may be prevented from taking advantage of the act of 1849 by its negligence, coupled with the exposedness of the person from whom it seeks to recover the money, to loss, should it recover the money. This negligence may consist apparently in failure to discover the fact of forgery for too long a time, and to give notice to the party to whom the payment has been made.[7] When the check was received by the drawee bank, through the clearing house, from another bank on June 3d, and at noon on June 4th the former bank notified the latter that

[2]P. L. 424; 1 Pa. L. 348.

[3]Tradesman's Bank v. Third Nat. Bank, 66 Pa. 435.

[4]The act of 1849, said Porter, J., "came to declare the law."—Rick v. Kelly, 30 Pa. 527; cf. Bank v. Bank, 159 Pa. 46. The act, said Paxson, J., "was not merely declaratory of the law as it then stood."—Corn Exchange Nat. Bank v. Nat. Bank of the Republic, 78 Pa. 233.

[5]Bank v. Bank, 159 Pa. 46. Read, J., remarked: "We are not called upon to decide what would have been their [the defendants'] situation if it had been actually paid out to them."

[6]Tradesmen's Bank v. Third Nat. Bank, 66 Pa. 435; Bank v. Bank, 159 Pa. 46.

[7]Bank v. Bank, 159 Pa. 46; Rick v. Kelly, 30 Pa. 527.

the check was a forgery, and demanded repayment, the former bank was not too late.[8] But in Iron City National Bank v. Fort Pitt National Bank[9] it is assumed by Mitchell, J., that it is the duty of a bank, even after paying a check, to re-examine it and re-investigate its genuiness, and that if it does not make this re-investigation, and the bank would not have discovered the forgery until the deposit book of the supposed drawer came in for settlement, had not the bank to which the payment had been made at the end of five days after the payment, suggested the inquiry, it is guilty of negligence which will preclude a recovery; if a recovery would then probably injure the bank to whom a payment was made.

NEGLIGENCE IN PAYING.

Possibly negligence of the bank in not inspecting the check at the time of paying it, and in not then discovering that it was a forgery, would preclude a recovery of the money. A was a depositor in a bank. He usually took his checks from a book; they were blue in color; they were punched or perforated by a stamp before presentation. The forged check which the bank discounted, had none of these qualities. The trial court in the action by the drawee bank against the bank to which the check was paid, left to the jury to decide whether there was negligence. The jury apparently found that there was and gave a verdict for so much of the money only as still remained in the possession of the defendant. The judgment was reversed, Paxson, J., saying, *inter alia*, "A case could hardly arise of the payment of money upon a forged check, in which a plausible charge of negligence could not be made. To hold that a failure to detect the forgery when such a check was presented for payment amounts to such negligence as would prevent a recovery under the act of 1849, would be to fritter away the act and render it practically useless. The fact that the check was of a different color from those usually drawn by the firm, and was not perforated, if evidence at all of negligence, was so unimportant as not to justify the submission of the question to the jury."[10]

[8]Corn Exchange Bank v. Nat. Bank of Republic, 78 Pa. 233. Notice on the day following the payment of the check, that it is a forgery, is not too late.—Stroudsburg Bank v. Shupp, 1 North. 35.

[9]159. Pa. 46.

[10]Corn Exchange National Bank v. National Bank of Republic, 78 Pa. 233.

WHEN THE DEFENDANT WILL NOT BE HURT BY REPAYMENT.

Even if the depository bank is negligent in paying a forged check, the person or bank, to which the payment is made, ought not to escape the duty of repaying, unless on doing such it will be certainly or probably subject to a loss. In Bank v. Bank[11] the defendant bank had allowed its customer, for whom it had obtained payment of the check to draw out $1,800 of the $1,957 on deposit. The forged check was $852. The court does not consider whether the plaintiff, found to have been negligent, ought not, nevertheless, to have recovered $157, the amount which the defendant could have retained from its customer's deposit. In Corn Exchange National Bank v. National Bank of the Republic,[12] the forged check paid by the plaintiff to the defendant was for $2,000. The defendant allowed its customer, to whom it had credited the check as a deposit, to withdraw $1,800 of the deposit before it was notified of the forgery by the plaintiff. The court below, on the hypothesis that the plaintiff had been negligent, allowed it to recover only $200. The Supreme Court, finding there was no sufficient evidence of negligence, reversed, at the instance of the plaintiff. When no part of the money paid by the drawee bank to the holder, also a bank, has been paid out by the latter to anybody, the former may recover the whole, although the notice of the forgery was not given to the holder bank until two days after payment. Whether there was any negligence in this delay, or otherwise, on the part of the drawee bank is not discussed.[13] The fact that the defendant is the collecting agent of another bank, and, as such, collected the check, is no obstacle to the recovery from it of the money.[14] The inability of the defendant to recover from the forger, does not preclude a recovery from him.[15]

RETURN OF CHECK.

Possibly, if the check has any value to the former holder, the offer to return it by the drawee bank, would be a precondition of its right to recover the money,[16] but the return of the check may have been waived by the defendant.[17]

[11]159 Pa. 46.
[12]78 Pa. 233.
[13]Tradesmen's Bank v. Third Nat. Bank, 66 Pa. 435.
[14]66 Pa. 435; 78 Pa. 233.
[15]78 Pa. 233.
[16]Roth v. Crissy, 30 Pa. 145.
[17]Stroudsburg v. Shupp, 1 North. 35.

LIABILITY OF BANK TO DEPOSITOR. FORGED ENDORSEMENT.

The bank has no authority to pay out the money of its depositor, except in conformity with his order, expressed in a check. If he orders payment to X or order, only X or the person to whom he orders payment by *his* endorsement, can be paid out of his funds in the bank. If then the bank pays a check drawn by him, but to one claiming under a forged endorsement of the payee, it pays its own money, not his. His deposit remains undiminished by the payment.[18]

NEGLIGENCE IN ISSUING CHECKS.

Possibly, negligence in issuing the check, not to the payee, but to X, claiming untruly to represent him, would preclude a recovery from the bank, by the drawer of the check, for having paid the check to his alleged attorney. But if he was a member of the bar, of an hitherto unblemished reputation, and if the drawer of the check was advised by his own attorney to make it, and if he knew of no facts that ought to have awakened his suspicion, he will not be esteemed negligent in having carried on the transaction with X, in the absence of the person whom he pretended to represent. The depositor is not bound to exercise "the extremely high degree of care which would make it impossible for an imposter to obtain from him a check payable to his alleged principal."[19]

NEGLIGENCE OF DEPOSITOR. EXAMINING CHECKS.

The depositor, when he learns of the payment of his check, has certain duties cast on him with respect to the bank. But he is under no duty, when his checks are returned, to examine the endorsements upon them, in order to learn whether they are genuine. "He has a right to assume that the bank, before paying his checks, will ascertain the genuineness of the endorse-

[18]Clark v. Savings Bank, 31 Super. 647; Chambers v. Union Nat. Bank, 78 Pa. 205; United Security, etc., Co. v. Bank, 185 Pa. 586; Land Title, etc., Co. v. Nat. Bank, 196 Pa. 230; Califf v. First Nat. Bank, 37 Super. 412; Houser v. Nat. Bank of Chambersburg, 27 Super. 613; West Phila. Bank v. Green, 3 Penny. 457.

[19]Houser v. Nat. Bank, 27 Super. 613. Says Rice, P. J., When the check is not delivered to the payee, but to a pretended agent, the drawer must use the care of a man of ordinary prudence in view of all the circumstances. Having done that, he is not bound to suffer the loss of his deposit, when the bank pays that check on the forged endorsement.

ment."[20] So, if a check payable to Matilda Brown, is endorsed "Matilda Brown, per M. C. Decker," the drawer of the check may safely assume that the bank, before paying this check, ascertained the authority of Decker to endorse it.[21] Hence, failure to discover the forgery by an examination of the endorsements within a reasonable time after the return to the depositor of his checks, from the bank, is not negligent. If, regularly, the depositor would receive, on his obtaining the money on the check, some voucher or security, and, he, in the case in question, has received no such voucher, this fact would probably put on him the duty of suspecting that the payee of the check had not in fact obtained the money, nor endorsed the check. If the check has been made payable to X, in making a loan to X, on a mortgage, the mere fact that the lender has not received the mortgage when the check is returned from bank, two or three weeks after the issue of the check, would have no significance Every one knows that when loans are made on mortgages in Philadelphia, weeks, and even months, elapse before the mortgage is returned from the office of the recorder or from the title company or conveyancer to whose care its preparation and the examination of title are entrusted.[22]

DELAY IN INFORMING BANK.

After the discovery of the forgery of an endorsement, the drawer of the check may be negligent in delaying to give the information to the bank. The discovery being made on March 27th, 1894, or immediately thereafter, or the facts making it incumbent on the drawer to have then discovered the forgery, failure to notify the bank until May 17th, would, apparently, have been fatal to the right of the drawer to contest the bank's right to charge his account with the check. But, if the drawer did not in fact learn of the forgery until May 17th the fact that an officer of it (a corporation) who committed the forgery knew of it cannot be imputed to the corporation.[23] The corporation is not bound to presume such a breach of duty by him. If the drawer of the check paid by the drawee bank, on April 8th, 1901, receives information from the payee, in June 1903, that

[20]United Security, etc., Co. v. Bank, 185 Pa. 586; Califf. v. First Nat. Bank, 37 Super. 412.

[21]Califf. v. First Nat. Bank, 37 Super. 412.

[22]Id.

[23]The United Security Co. v. Bank, 185 Pa. 586.

she has not received the money on the check, a delay in informing the bank until April, 1906, would be too great. But, if the information from the payee was simply that she had not received the check, (the check being indorsed in her name "per M. C. Decker"), since such non-receipt would be consistent with Decker's having authority to receive it and endorse it in her name, it would not be information that Decker had no such authority and that she had not received the money upon the check.[24]

In McNeely Co. v. Bank of North America[25] forgeries of endorsements upon checks issued by the company, occurred at many times between April 20th, 1897, and February 24th, 1903. No negligence on the part of the company, in not discovering that these forgeries had occurred before January 21st, 1904, was found to exist. But no notice was then given to the bank for nearly three months. It was held that this delay exonerated the bank of any duty to replace the plaintiff's money, paid out on the checks with forged endorsements, although there was no evidence that, with the earlier knowledge it could have recovered from the party to whom it paid the check, the forger or others, there being likewise no evidence that it could not have thus recovered. The banks, says Brown, J., may or may not be able to recover from the forger by prompt action. Its right is to try. The forger may be insolvent, or beyond civil or criminal process, but by prompt proceedings against him others may come to his assistance who, after delay, would not do so. As prompt notice should be given to the bank, as, on dishonor of a note, must be given to an endorser in order to hold him.

OTHER MISPAYMENTS.

The depositor may make a check payable to the bank's cashier in order that he may use the money in a way previously agreed upon. If the bank without the drawer's consent allows the money to be used in a different way, or to be withdrawn

[24]Califf v. First Nat. Bank, 37 Super. 412. Whether the non-receipt of the check by Mrs. Brown should have awakened suspicion in the drawer's mind, was for the jury. A delay of six weeks after learning of the forgery before notifying the bank, may be found by the jury too great. Cunningham v. First Nat. Bank, 219 Pa. 310.

[25]221 Pa. 588.

[26]Parker v. Hartly, 91 Pa. 465.

after the purpose of the arrangement has been accomplished, the bank will be liable to the depositor for the money.[26]

NEGLIGENCE MUST CAUSE LOSS.

Negligence does not *ipso facto* expose the drawer of the check the name of the payee in which has been forged, to the loss of his deposit, when the depository bank pays it, unless such negligence would, should the depositor (drawer of the check) repudiate the payments, result in loss. A check was drawn by A upon his bank, X, payable to B. It was endorsed without authority, with B's name, and presented to the Y bank. The Y bank guaranteed the endorsement and also endorsed it and presented it for payment to the X bank, on April 8, 1901. The X bank paid it. Not until June, 1903 wasA informed, or bound to know, of the unauthorized endorsement. A did not inform the bank of the facts until April, 1906. The court, approving a verdict and judgment for A against the X bank, observes "there was not at the trial in the court below any attempt made to produce evidence that the position of the First National Bank [X, the defendant] had been altered for the worse between June 1903, and the time of the bringing of this action, because of the failure of the plaintiff to communicate directly to that bank what Mrs. Brown (the payee whose name was endorsed without authority) had said. The Athens National Bank [Y] which had received the money from the defendant and was liable over, in case the endorsement was without authority, had immediate notice of all the plaintiff knew."[27] If the negligence in giving notice too tardily to the bank, that it has paid the check upon a forged indorsement will injure the bank, if it is denied the right to charge the check against the drawer's account, that right will not be denied to it. A draws a check to the order of T, upon his own bank X. K obtains this check and endorses it in the name of T and his own, presents it to the Y bank, and at K's suggestion (K being president of the Z bank) gives credit to the Z bank for the amount. It is error to exclude evidence that between the time when the drawer of the check (the depositor in the X bank) became aware of the forgery and the time of its notifying the X bank (the defendant), a period of six weeks, (bank T had become insolvent) that bank Y had

[27]Califf v. First National Bank, 37 Super. 412. Compare with McNeely Co. v. Bank of North America, 221 Pa. 588.

had at the beginning of that period, funds in its hands belonging to Z sufficient to reimburse it for the money put to the credit of Z, and that were bank Y compelled to pay back the money to X, upon its warranty of the indorsement of T as it might were X compelled to allow A's deposit to remain intact it would suffer loss. Although Z had not endorsed the check, and therefore was not liable as endorser to Y, it was bound to return the money to Y, which had paid it under mistake concerning the genuineness of the signature of T.[28]

FORGED ENDORSEMENTS OF CHECKS. BANK'S RIGHT TO RECOVER. WARRANTY.

When the holder of a check endorses it over to the bank upon which it is drawn, or to another, he warrants the genuineness of all the prior endorsements, even that of the payee. The drawee is not supposed to know the endorsements. "There might be half a dozen endorsements of distinct persons, entirely unknown to the bank and certainly the holder [who obtains payment from the drawee banks] must guarantee them to the bank and not *vice versa*.[29] "Every endorser," says the 66th section of the act of May 16, 1901, an act relating to negotiable instruments, "who endorses without qualification warrants to all subsequent holders in due course," that the instrument is genuine, and in all respects what it purports to be; that he has a good title to it; that all prior parties had capacity to contract, and that the instrument is at the time of his endorsement, valid and subsisting. Sometimes a person who endorses a check or draft, also expressly warrants the prior endorsements,[30] but probably this adds nothing to the obligation arising from the mere act of endorsing the instrument and procuring the money for it.

EFFECT OF BANK'S NEGLIGENCE.

The bank having paid the check to a *bona fide* purchaser of it, after a forged endorsement of the payee's name, may recover back the money paid such purchaser unless it has been negligent,

[28]Cunningham v. First Nat. Bank, 219 Pa. 310. If this case implies that the X bank would suffer no loss because of its right of action on the warranty of genuineness of the endorsement by the Y bank in the absence of evidence of the insolvency of the Y bank, it is remarkable. It has the risk of failure and expense of suit.

[29]Chambers v. Union Nat. Bank, 78 Pa. 205.

[30]Califf v. First Nat. Bank, 37 Super. 412. Cunningham v. First Nat. Bank, 219 Pa. 310.

and the recovery of the money would entail a loss on the purchaser. The negligence might consist in failure for an undue time to discover the forgery, and to give notice to the person to whom it had made the payment. But, the check having been sent to the payee by mail, and stolen from the mail, and then the name of the payee having been forged and payment of the check obtained, failure on the part of the drawee bank for 17 days to discover the forgery, was not attributable to the fault of the bank. If as soon as it made the discovery, it notified the holder to whom it had paid the check, it could recover.[31] Perhaps the check being payable to the cashier of a bank, or order, the fact that the endorsement purporting to be that of the cashier was not in the usual manner, would make it negligent for the drawee bank to pay it. But the court refused, the endorsement being "Pay to M. R. Rizer & Bro. or order, C. N. Jordan cashier," to affirm a point to the effect that if the jury find the endorsement not made in the usual manner [the usual manner does not appear to have been proved] and that the draft was of a class very rarely put in circulation [the draft was by the cashier of one bank upon another bank, and was payable to the cashier of a third bank] or received from private hands, it was negligence on the part of the drawee bank to pay it without inquiry or remark, and the bank could not recover. Nor did it preclude a recovery by the bank, that immediately after defendant had bought the draft, he showed it to the paying teller of the bank on which it was drawn, and asked if it was good, and obtained the reply, that it was good if the endorsement of M. R. Rizer & Bro. was right. The trial court properly declined to say that the omission of the teller to say that the form of the cashier" endorsement was calculated to excite suspicion would prevent a recovery.[32]

LIABILITY OF BANK, WHICH HAS COLLECTED ON FORGED ENDORSEMENTS.

In Tibby Bros. Glass Co. v. Farmers & Mechanics' Bank[33] the question is presented, can the payee of checks, which a bank, not the depository bank, has paid to one who has forged the payee's name as endorser, having collected it from the de-

[31]Chambers v. Union Nat. Bank, 78 Pa. 205.

[32]Id.

[33]220 Pa. 1.

pository bank, recover from it this money. The plaintiff received checks from various persons, drawn on various banks. His clerk, whose duty it was to collect these checks at the X bank (not the bank on which they were drawn) obtained possession of checks and by means of a rubber stamp, endorsed them with plaintiff's name, presented them at the X bank, and received the money. The X bank collected the checks from the various banks upon which they were drawn, and had the money thus collected, when the suit was brought. Plaintiff, having obtained the checks again, in some way, presented them to the X bank again, but the bank refused to pay. Liability was denied by the court. As the drawee bank, having no contract with the payee of a check, could decline, as to him, to pay it, a non-drawee bank is equally exempt. "The action of the defendant," says Mestrezat, J., "in cashing the checks puts it upon no better ground [for a recovery by the plaintiff] than if it had been the drawee bank, and establishes no relations between it and the plaintiff company that would warrant the latter in maintaining an action for the recovery of the amount of the check."[34] To the contention that the defendant having received the money of the plaintiff, on the checks, and the plaintiff having given credit to its customers for the amounts of their checks, the defendant is liable for money had and received for the use of the plaintiff, the reply is, that defendant did not receive, in receiving the amount of the checks, the money of the plaintiff or money for its use. The money paid on the checks, was not the money of the drawer of the checks; but of the banks that paid it. The drawers of the checks continued liable upon them to the holder. The money received by the defendant from the drawee banks may be recovered from it by them. If the plaintiff's bookkeeper entered a credit in its books, in favor of its customers, to the extent of the checks received, that credit is conditional. The checks have not yet been paid, out of the funds of the drawers, and if they are not hereafter paid, the credit may be rescinded.

LIABILITY OF BANK WHICH SELLS A DRAFT OR A CHECK.

A buys from bank B, a draft or check for $900, drawn upon bank C, and payable to Rebecca Vincent. She was then dead, but A did not know it. The husband of Rebecca forged her

[34]This is a tacit denial of the doctrine of Seventh Nat. Bank v. Cook, 73 Pa. 483.

name to the check, and the money was obtained upon it from T & Co. in Alabama. T & Co. transmitted it to bank C, which paid it. A, having been compelled to pay $900 to the administrator of Rebecca Vincent, sued bank B. It was held that he could not recover, because mistakenly believing Rebecca to be alive, he had caused the check to be issued payable to her. "As between two innocent parties, he who, by first acting, makes loss possible, by inducing the other to act, must bear it." Another reason for refusing to allow a recovery, is founded on the principle that A not having given notice to the bank, has exposed it to loss, should he recover. He learned the death of Rebecca Vincent in June 1893, three months after he purchased the draft. He said nothing to the B bank until January, 1897. Had he given prompt notice to the B bank, it could have notified the drawee bank, C. It, in turn, could have notified T & Co. of Alabama. If the B bank should now demand the money from the C bank, it could reply (T & Co. having failed prior to notice to the B bank) that notice had not been given it such as the law requires. Thus argues Brown, J. He disapproves of the reasoning of the Superior Court (17 Superior, 256) though adopting its decision, which held that Rebecca Vincent's husband personated her, and the check, was intended for him. There was therefore no forgery.[35] The case indeed is a simple one. A tells bank B that he wants a draft for $900, payable to Rebecca Vincent. He pays the money for it, and gets it, that which he asked for. How is B responsible for any misuse that somebody to whom A sends this draft, may make of it?

NOT A FORGERY.

If X personates A in a transaction with B, which results in B's giving X a check payable to A (supposed by him to be X) and X endorses this check in the name of A, this endorsement is not a forgery, and if X, having thus endorsed the check, deposits it in bank N, and N receives payment of it from the bank upon which the check is drawn, that bank cannot recover the money from N. A drawee bank can only recover, when it will suffer a loss, if it does not recover; when, e. g., it will be unable to obtain credit for the payment, as against the drawer's account. But if the drawer imposed on by the personator, has made a check payable to the personator, in the falsely assumed

[35]States v. First Nat. Bank, 203 Pa. 69.

name, and the personator endorses it, the depositor can not successfully deny the right of the bank to be reimbursed from his deposit. So if the check is drawn by the real estate department of a Trust Company, upon its banking department, the Trust Company would have no right of action against *bona fide* purchaser of the check, if the payee intended by it, (though a personator) actually endorsed it. Hence, considered as a bank, it could not recover from another bank to which it paid this check.[36] If a firm gives to a clerk a power of attorney to draw checks against its account, and the clerk draws a check to a person having no business relations with the firm, and he forges the name of such person, and obtains the money from the bank, the check is to be regarded as payable to bearer; the forgery of the payee's name is insignificant. The bank is entitled to credit against the firm.[37]

UNAUTHORIZED CHECK.

A bank which pays a check, is entitled to credit as against the depositor (a corporation) although, being drawn by its treasurer, he intends to use the money for his own purposes. The fact that the check has been taken, not from the check book, and that the whole of it has been written, and that it has been signed by the treasurer, whereas usually the secretary writes and the treasurer signs checks of this corporation, is not sufficient to defeat the bank's right to a credit for the payment.[38]

LIABILITY OF THE BANK TO DEPOSITOR.

The bank implicitly contracts with its depositor to pay out the deposit, in parts or in one sum, to such persons as he shall designate in writing; i. e., by checks. If it refuses, it exposes itself to a double action,[39] to an action for the money on deposit and to an action for damages. Nominal damages may in any

[36]Land Title & Trust Co. v. Northampton Nat. Bank, 196 Pa. 230; 211 Pa. 211. But the application of this principle of personation, made by the Superior Court, in States v. First Nat. Bank of Montrose, 17 Super. 256, was disapproved, in 203 Pa. 69.

[37]Snyder v. Corn Exchange Nat. Bank 221 Pa. 599. It is immaterial that the clerk delivered these checks to the proprietor of a "bucket shop;" or that a trust company in which the checks had been deposited for collection, guaranteed the signatures of their depositors.

[38]Gunster v. Scranton. etc. Co., 181 Pa. 327.

[39]First Nat. Bank v. Shoemaker, 117 Pa. 94; the statute of limitations runs as against both actions.

case be recovered[40] and also the damages shown to have been actually suffered. Nor need the evidence be definite of the amount of the damages suffered. For the refusal to pay a check of $68, and another of $250, judgment on a verdict for $1,000 was entered, after a remittitur of $400 was filed.[41] Substantial damages may be recovered, although the bank's not honoring a check was the result of an error in the account of the depositor, made by the bank's clerk, of a wrong addition of a column.[42] "The mere fact," said Hare, P. J. "that he" the depositor "was obliged to bring suit, if he ought to obtain any compensation, the mere fact that he was disturbed in his business might be reason to apply to the jury to give him compensation for it; but the serious question is what is this injury, the real harm suffered. It has been said that the smaller the check [dishonored by the bank] the greater the injury. I confess it does not strike me in that light. It is altogether a question of circumstances." In Patterson v. Marine National Bank,[43] the court without error told the jury that if a bank, refusing to honor the check of the depositor, X, pays out the deposit to another, who claims that X was a mere trustee for him, and if in fact X was not a trustee of the deposit for him, X is entitled to substantial damages. The loss of credit by the depositor, from the bank's refusal to honor his check, may be a ground for damages, without evidence of some tangible pecuniary loss. The business of the community says Paxson, C. J., would be at the mercy of banks, if only nominal damages were recoverable, in the absence of proof of special damage, in consequence of their refusal to pay the deposits on the checks of the depositor. A breach of its contract to pay on check, entitles the depositor to substantial damages.

EXEMPLARY DAMAGES.

The bank may be subjected to punitive damages, if the jury find that it unnecessarily and unreasonably acted in disregard of the right of the plaintiff [the depositor] and with partiality

[40]First Nat. Bank v. Shoemaker, 117 Pa. 94.

[41]Birchall v. Third Nat. Bank, 15 W. N. 174. In Patterson v. Marine Nat. Bank 130 Pa. 419, the verdict was for $300.

[42]Birchall v. Third Nat. Bank, *supra*. The verdict was for $1,000, in which, reduced to $600 judgment was entered, although the judge said that he did not think there was any special damage proved.

[43]130 Pa. 419.

against him.[44] If the bank's conduct is wilful, if it delays to make reparation, after dishonoring the check, exemplary damages are allowable; but when a mistake in casting up the account of the depositor has been made, and as soon as discovered, all possible reparation is tendered.[45]

NOMINAL DAMAGES.

Nominal damages in any case, may be recovered, for the dishonor of the depositor's checks, even when no actual damage is shown.[46]

LIABILITY OF BANK TO DEPOSITOR.

When a man puts his money in the bank, the latter tacitly agrees, if not expressly, to pay it out upon his checks, to others or to himself, but not to pay it out upon the checks of others. If, a check is drawn by another to which without his authority, the depositor's name is affixed, such check is no justification for the payment of the depositor's money, upon it. The money paid upon it, will not be his, but the bank's, and, the bank cannot withhold a corresponding amount of the deposit. It must pay the sum deposited on proper demand, to the depositor.[47] This demand will be formally and regularly made by his check, but the presentment of a check may be waived by the bank, which will then become liable to suit, without the check, if it declines to pay the money to the depositor. The depositor's right to recover the deposit, does not depend on proof of his suffering loss. There is no burden on him of showing that he will suffer a loss. The fact that he has obtained some collateral security to reimburse him for acts of one who may have forged his name to the checks which the bank has paid, upon which however, nothing has been as yet realized, does not preclude his recovering from the bank.[48]

WHAT PRECLUDES DEPOSITOR'S RECOVERY.

The depositor may by his negligence have betrayed the bank into the payment of a check to which his name has been

[44]130 Pa. 419. The verdict being for $300, the court said the jury "evidently did not award punitive damages." The deposit, which the bank had paid to another than the depositor was $1,404.

[45]15 W. N. C. 174.

[46]117 Pa. 94.

[47]Robb v. Penna. Co., 3 Super. 255; McNeely Co. v. Bank of N. America, 221 Pa. 588.

[48]W. Philadelphia Bank v. Green, 3 Penny. 456.

forged, or affixed without his authority. But the mere having of a rubber stamp which imprints a name which is the facsimile of the depositor's bank signature[49] is not such negligence. The fact that some one improperly gets possession of this stamp and uses it in the forgery of checks, does not visit the effect of such forgery upon the depositor; does not justify the inference of negligence in the custody of the stamp. A stamp was put into a compartment of a fire-proof safe. This compartment was locked and the key was put in a drawer in the safe, behind some papers, and covered up. The drawer was then locked, and its key put into another—but unlocked, drawer in the safe. The safe was then locked, and its key was put in a little box which was placed in a wooden drawer or box. This last was kept on top of the safe. An office boy, 16 years of age, was employed for errands and messages, including the sending of him to bank to draw money on checks. There never had been occasion to doubt this boy's honesty. The boy having without the employer's knowlege, watched his moves in opening and closing the safe, found the safe key, opened the safe, and then found the key of the inner drawer, and gained access to the rubber stamp. By means of this he forged checks. It was for the jury to say whether in these acts, the employer was negligent in keeping the stamp. The court properly declined to say that he was. "He is not" says Rice, P. J. "an insurer against its [the stamp's] unlawful use, but it may be conceded that he is responsible for the consequences of his negligence in keeping it. He is bound to exercise [i. e. bound to the depository bank] the care of an ordinarily prudent man."[50]

EFFECT OF BANK'S NEGLIGENCE.

Probably, if the bank was negligent in paying the check; i. e. in not then discovering that it was forged, it cannot insist on prompt subsequent discovery of the forgery by the depositor, and upon prompt notice from him, to the bank.[51] It is probably not such negligence for the bank to honor a check which has not been taken from the regular check book of the supposed drawer, though his genuine checks are usually taken from such

[49]A signature left by him with the bank with which it may compare signatures on checks, etc., purporting to be his.

[50]Robb v. Penna. Co., 3 Super. 255.

[51]Cf. Peoples' Savings Bank v. Cupps, 91 Pa. 315.

book. Nor is it negligence to honor a check which is both written and signed by J, the treasurer of the depositor, a corporation, although the checks of the corporation have been usually written by the secretary and signed by J, the treasurer. "The signature of the depositor," says Mitchell, J., "is the essential feature of a check, and a bank is not bound to pay any attention to the handwriting of the other parts unless it shows something to excite suspicion. Nor was there anything to put the bank upon inquiry in the fact that the drafts were drawn to Jessup's [the treasurer's] own order."[52] Possibly, if the forgery is unskillfully done, the bank's failing to detect it would be the result of negligence. But negligence is not presumed, and the depositor who affirms it must show that the forgery ought not to have imposed, would not have imposed, on the bank, had it exercised proper care. "In the absence of any evidence, from the signatures themselves [which were not produced], or from witnesses, that there was any difference between them and the plaintiff's signature, which could be detected by the eye, it must be assumed," says Sterrett, C. J., "that the forgery was of such a character that the bank, acting with due care and caution, was deceived by it."[53]

ESTOPPEL

Besides the fact that delay in notifying the bank that the checks it has paid are forgeries may cause it to lose a means of recovering the money from the forger, etc., the failure to notify it may beguile it into a recognition and payment of other checks, forged by the same person, so that, as to these other checks, the depositor would be estopped from contesting their genuineness with the bank.[54]

A series of forgeries extending over nearly three years being shown, it was shown that the depositor did not discover that the first two of those returned to him shortly after they had been cashed by the bank were forgeries, and, consequently, did not notify the bank. "No objection," says Sterrett, C. J., "having been made at the time of the first settlement, the bank had a right to assume that everything was correct, including the two checks purporting to be signed by him [the depositor].

[52]Gunster v. Scranton, etc., Co., 181 Pa. 327.
[53]Myers v. Bank, 193 Pa. 1.
[54]Myers v. Bank, 193 Pa. 1.

This silence was tantamount to a declaration to that effect, and, in afterwards honoring checks signed by the same person, the bank had a right to consider the fact that these signatures had been at least tacitly recognized by the plaintiff [the depositor] as genuine.''[55]

OTHER NEGLIGENCE.

The bank returns, at intervals, to the depositors, the checks which it has paid, bearing his signature. He owes to it a duty of examining these checks; of discovering whether they are genuine or not, and, if not genuine, of giving timely information to the bank. Within a reasonable time after the return to the depositor of the checks, it is entitled to a return of any that may be forged or unauthorized, and if they are not thus returned, the bank may keep a corresponding part of the deposit. In Myers v. Bank,[56] the bank charged to the depositor's account between March 26th and May 29th, 1891, two forged checks. At intervals, until November 24th, 1893, it charged other forged checks. When the bank book was settled, May 29th, 1891, S, the bookkeeper of the depositor, who forged these checks, called on the bank, obtained the checks, returned to the depositor only the genuine ones, and then, in order to conceal his wrongdoing, made forged entries and forced balances in the depositor's books, so that the balance appearing on the deposit book corresponded with the apparent balance due by the bank. The depositor, in each instance when the checks were returned, carefully examined the signature on the checks actually received by him, and found them to be genuine. The forgeries were not discovered by him until 1894. They amounted altogether to $13,090. In an action by the depositor for this amount, these facts appearing, the trial court properly instructed the jury to find for the defendant bank. The plaintiff was not chargeable with knowledge of the forgeries, but he was clearly responsible for the acts and omissions of his clerk in the course of the duties of receiving the checks from the bank. The delivery of the checks, after

[55]Myers v. Bank, 193 Pa. 1.

[56]193 Pa. 1. In McNeely Co. v. Bank of North America, 221 Pa. 588, the clerk concealed his forgeries from his employer by a complicated and ingenious system for six years. The referee found that the employer was not negligent in not discovering the forgeries within that time. But the depositor was negligent in not informing the bank for more than three months after he discovered the forgeries.

payment by the bank, to the clerk, was in law a delivery to the plaintiff himself. The bank was entitled to have the checks examined in a reasonable time. There is no finding of negligence on the part of the plaintiff. There is, apparently, an absolute right in the bank to have information in a reasonable time, after return of the checks, if they are not genuine.

NEGLIGENCE IN NOTIFYING THE BANK.

Although the depositor may not be negligent in the discovery of the fact of the forgery, after the return of his checks by the bank, he may be negligent in revealing his discovery to the bank. The bank has a right to quick notice; and, if it does not receive such notice, it will have a right to retain the depositor's money to the extent of the checks bearing his signature, though forged, irrespective of any actual loss that would be suffered by it by compelling it to repay the depositor. If early notified, the bank may proceed at once against the forger. The forger may be solvent, or, even if he is insolvent, others may come to his assistance who, after a delay, would not do so. The burden is not upon the bank to show that it would have recovered the money if it had been early informed of the forgery. As an endorser is discharged, *ipso facto*, if not promptly notified of the dishonor of the note by its maker, so the bank is discharged, *ipso facto*, if not promptly informed of the forgery.[57] Hence, a delay of nearly three months after discovering the forgery, in notifying the bank, will entitle it to retain from the depositor, the money which it has paid out.

UNAUTHORIZED PAYMENTS.

The bank may have agreed not to pay out moneys on checks unless the checks are "properly witnessed." Depositors have a right to rely on such an agreement. If, therefore, the bank pays out to the depositor's son the amount on deposit, on a check not witnessed, and the check is a forgery, or the reception of the money by the son was not authorized, the depositor may recover the money from the bank.[58] If A gives X general authority to draw checks upon his deposit, the bank has a right

[57]McNeely Co. v. Bank of North America, 221 Pa. 588.

[58]Peoples' Savings Bank v. Cupps, 91 Pa. 315. The payment by the bank was made without comparison by the teller of the signature on the check with that in the signature book. The notice of the intention to withdraw the money, required by the by-laws, had not been given.

to pay a check drawn by X, although X has drawn it with a fraudulent intent, of which the bank has no knowledge.[59] The fact that after X has, as attorney of A, made a check payable to Z (a fictitious person) and endorsed the name of Z upon it, he passed it on to M, who deposits it for collection with a bank, which bank forwards it to other banks for collection, guaranteeing the prior endorsements, does not prevent the bank, upon which the check is drawn, from obtaining a credit for the payment as against A.[60]

CHECK OVERDUE.

When a check becomes overdue, that fact is notice to the drawee bank not to pay it. If there has been a failure of consideration for a check, or if it has been paid, but not taken back from the holder, who subsequently passes it to another person, or bank, and the drawee bank pays it above a year after it was payable the bank cannot recover the amount paid from the drawer,[61] nor, his deposit being sufficient, charge the amount against that deposit.

DUTIES OF COLLECTING BANKS IN SELECTING SUB-AGENT.

When a check is deposited with a bank, drawn upon a distant bank, it is the duty of the former not to send it to the latter but to send it to some agent to make the collection. The drawee bank is not a suitable agent to demand payment from itself. Its interest is to delay, instead of speeding, payment.[62] If the check is sent to the drawee bank, and, in consequence, payment is not secured, which would have been secured, had the check been sent to some other agent, the collecting bank will be liable for the loss to the customer who has deposited it,[63] and the drawer will be discharged from liability to the holder.[64]

RESPONSIBILITY FOR ACT OF SUB-AGENT.

In the absence of agreement modifying its liability, the collecting bank, when the drawee bank is at a distance, is under

[59]Snyder v. Corn Exchange Nat. Bank, 221 Pa. 599.

[60]Snyder v. Nat. Bank, 221 Pa. 599.

[61]Lancaster Bank v. Woodward, 18 Pa. 357.

[62]Bank v. Goodman, 109 Pa. 422; Hazlett v. Commercial Nat. Bank, 132 Pa. 118; Wagner v. Crook, 167 Pa. 259.

[63]Banks v. Goodman, 109 Pa. 422.

[64]Wagner v. Crook, 167 Pa. 259.

a duty to select a proper sub-agent. This sub-agent becomes the agent of the depositor of the check, who cannot hold the collecting bank liable for its negligence or misfeasances.[65] In Farmers and Mechanics Bank v. Third National Bank of Pitts burg,[66] it appears that the collecting bank was held responsible for the failure of the sub-agent to present a check for collection when, had it been presented, it would have been paid.

DUTY OF DILIGENCE.

The lack of diligence of the collecting bank resulting in the failure to obtain payment of a check from the bank on account of its supervening insolvency will make it responsible to the depositor with it, of the check, for the amount thereof.[67] The bank may limit its duty. It may, e.g., undertake to collect only through the clearing house. When it does so, it will not be liable for the non-collection of the check, if not practicable through the clearing house, although, had it gone to the counter of the drawee bank, it could have obtained payment. A check on the Penn Bank of Pittsburg was deposited in the A bank, for collection. The bank in East Birmingham, sent it to B bank in Pittsburg. The Penn Bank had then for seven days suspended payment. It was open however for an hour on the afternoon of the same day. It was open the afternoon of the next day (Saturday), and a part of the following Monday. Checks on the Penn Bank were paid through the clearing house on Saturday but not on Monday. This check was not sent to the clearing house on Saturday, but on Monday, when it was dishonored. The clearings made on Saturday, were made before the Penn Bank opened. Without knowledge or the means of knowing that that

DUTY TO ACCEPT ONLY MONEY.

In the absence of special agreement, the collecting bank's duty is to accept in payment of a check only money; not a cashier's check of the drawee,[69] not a check of the drawee upon some other bank.[70] If it accepts such substitutes for money without the acquiescence of its customers, it will be liable to him for the bank would resume payment on Saturday, there was no duty on the B bank to send checks on it to the clearing house.[68]

[65]Bank v. Goodman, 109 Pa. 422; 5 Cyc. 502.

[66]165 Pa. 500.

[67]Hazlett v. Nat. Bank, 132 Pa. 118.

[68]F. & M. Bank v. Third Nat. Bank, 165 Pa. 500. Settlement subsequent to the alleged negligence of the B bank, between it and plaintiff, had been made through a series of years.

amount of the check. But, the customer may acquiesce. H, at Washington, Pa., mailed to the A bank in Philadelphia, his check upon the Penn Bank of Pittsburg, for $5,000. The A bank gave H credit for $5,000 as cash, and transmitted the check directly to the Penn Bank. This bank received it May 21st, marked it "paid," charged the amount of it to the account of H, and forwarded to the A bank its own check on the B bank, its Philadelphia correspondent. About noon of March 21st, the Penn Bank suspended payment. The check on the B bank reached the A bank on May 22nd, but payment was refused. The A bank at once wired H, the same day, that it had received the check on the B bank, that that check was not good, but that it would hold it subject to his order. H replied: "The Penn Bank is all right, and their draft as mentioned will be paid in a day or two. Please hold for a few days, and, if not honored, return it to me." The Penn Bank opened for business on May 24th, and closed finally on May 26th. H, on June 2nd, explained to the A bank that, when he wrote, he thought his own check had been returned. It had not been returned, but had been kept by the Penn Bank. Paxson, C. J., says that on the receipt of information that the Penn Bank had given its check on the B bank, "the plaintiff (H) had then a right to repudiate what the defendant bank had done, and hold it for the money. He did not do so. On the contrary, he wired the bank as follows: * * * * It must be borne in mind that when the plaintiff sent this telegram. he was in possession of all the facts. * * * With this information he directed the draft on Philadelphia [check on B bank] to be held for a few days. He cannot now complain of the delay. It was his own act and condoned the original negligence.[71] When the collecting bank fails without negligence to obtain payment in money of the check it may return it to the customer who deposited it. He may then sue the drawer upon it. Or, perhaps, it could call on him after notifying him that the check had not been paid in money, for further instructions. If doing so, it followed these instructions, it would not be liable.[72]

[69]Nat. Bank v. Ashworth, 123 Pa. 212.

[70]Hazlett v. Nat. Bank, 132 Pa. 118.

[71]Hazlett v. Nat. Bank, 132 Pa. 118.

[72]Fifth Nat. Bank v. Ashworth, 123 Pa. 212. The check on the Penn Bank was passed through the clearing house on May 21st, 1884, but was

RELATION OF COLLECTING BANK.

When A having X's check drawn upon the M bank, deposits it with his own bank P for collection the P bank becomes his agent. The mere fact that that bank credits him with the check as cash, does not alter the relation. It is the almost universal usage to credit such collections as cash, unless the depositor of it, A, is in weak credit. If the check should not be paid, it is charged off again and the unpaid check returned to the depositor.[73] The bank can charge back the check, if it fails, without negligence, to obtain payment because of insolvency of the drawee bank[74] or if, having obtained payment, it is obliged to pay back because the check has been "raised."[75] From the fact that the collecting bank gives credit for the check to the depositor, he has no right to infer that it has been paid, and if thus inferring, he subsequently parts with value to the person from whom he got the check, the loss arising from the fact that the check is forged, etc., will fall upon him.[76]

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not paid, the bank closing its doors on that day. It opened again on May 23rd (Friday) at 3 P. M. It remained open all of Saturday, but finally closed on the following Monday morning. The collecting bank sent the check to the Penn Bank on Saturday, and received from it a cashier's check. The check was delivered to the Penn Bank, when the cashier's check was given by it. It was charged up against the drawer's account by the Penn Bank, which still retained it. The cashier's check was sent to the clearing house on Monday, and when it reached the Penn Bank that bank had finally closed its doors, and shortly thereafter made an assignment for creditors. Paxson, J., says that irrespective of any negligence of the collecting bank in not sending the dishonored check through the clearing house on Saturday, it fixed its liability by giving up the check to the Penn Bank, and accepting from the latter the cashier's check. This entitled the payee of the check to consider it paid to the collecting bank, and to require the collecting bank to pay the amount of it to him. It was further said that he could require payment of the whole amount, notwithstanding that he subsequently received a partial payment from the drawer.

[73]Hazlett v. Nat. Bank, 132 Pa. 118. Rapp v. Nat. Bank, 136 Pa. 426.

[74]132 Pa. 118.

[75]Rapp v. Nat. Bank, 136 Pa. 426

[76]Rapp v. Nat. Bank, 136 Pa. 426. Successive settlements between banks, through a series of years after the alleged negligence, may preclude the successful allegation of liability for that negligence.

MOOT COURT.

PALMER V. SULLIVAN.

Conditional Contract—When Closed—Measure of Damages.

STATEMENT OF FACTS.

In December, 1908, Sullivan asked Palmer to loan him $5,000 for one year at 6 per cent. agreeing to give as security a mortgage on a property named. Palmer replied that he would make the loan if he found the title of the property all right and if Sullivan would assure him that he would take the money for the time and at the rate specified. To this Sullivan agreed. The loan was to date from Jan. 1, 1909. Palmer employed an attorney to search the title of the property, sold various stocks and bonds netting him less than 6 per cent, paying broker's commission for selling them and was prepared to deliver the money on Jan. 1st. In the afternoon of that day, Sullivan called on Palmer and stated that he had found a man who would lend him the money at 5 per cent. and that he had closed with the other man. It would have cost Palmer $400 more to buy back the securities he sold than the price he received for them, he having sold in a rising market. Finding no other borrower, he deposited the money in bank at 3 per cent. where the money remained until Jan. 1, 1910. Palmer now brings assumpsit against Sullivan for $160 damages, $10 for searching the title and $150 lost interest.

BROWN for Plaintiff.

BRUCE for Defendant

OPINION OF THE COURT.

WOODWARD, J. The learned counsel for the plaintiff has confined himself both in his argument and brief to the ascertainment of the measure of damages. But before that problem requires solution we must determine whether there existed that contract for the alleged breach of which the plaintiff now seeks to recoup himself. Three questions arise. Was there a contract formed after the first conversation in December? Second: If not. what *was* the status of the parties thereafter? Third: Did the acts of Palmer in investigating the title and procuring the cash consummate a contract between the parties?

As to the first query, we are well satified that there was no contract created by the preliminary negotiation. For there was no agreement which had binding force on Palmer. And Palmer not being bound, Sullivan's promise was without consideration and unenforceable.

Sullivan makes an offer to tender certain compensation and security for the loan of $5,000. The acceptance of Palmer has two strings attached. First: That Sullivan shall agree to take the money at the rate and for the time proposed. Sullivan accedes. Second: That Sullivan's title shall be found "all right." This is a matter to which Sullivan's acquiescence is im-

material, because he is not the one to decide it. Hence there is no contract thus far. For "to constitute a valid contract there must be a mutual assent to the same thing in the same sense: therefore an absolute acceptance of a proposal, coupled with any qualification or condition will not be regarded as a complete contract because there at no time exists the prerequisite mutual assent to the same thing in the same sense."—Bruner v. Wheaton, 46 Mo. 363.

It will make it clear if we will consider the effect of the instant death of Palmer. His executor or administrator is sued by Sullivan for breach of contract. But the representative shows that Palmer never "found the title of the property to be all right." Hence there was no contract and accordingly no breach. And since Palmer is not bound, neither is Sullivan, for it is "horn-book law" that where one party is not bound the other is not. —Johnson et. al. v. Tressler, 7 Watts 48.

Authority as well as reason fortifies the conclusion that so far there is no contract. "It has been held that there is no agreement where an acceptance varies an offer as to the time of performance, place of performance, price, quality, etc;" as where property is offered for sale and the acceptor stipulates that payment shall be made at his place of residence; or where the offer is to buy a horse, and the offeree accepts, "if he will come for it"—Cyc. 268; or where a person offers to make a quit-claim deed for land and the offeree accepts on condition that he turn over certain other deeds, Egger v. Nesbitt, 122 Mo. 667; or in a Pennsylvania case where there was an acceptance of ce rtain oil property, "if the property was as represented". Vincentv. Woodland Oil Co. 165 Pa. 402; or where an offer to sell land is accepted "provided the title is perfect."—Corcoran v. White, 117 Ill., 118.

This brings us to the second point. What then, after the conversation, *was* the status of the parties? We believe that their position was in effect as though Sullivan had made a continuing offer to accept the $5,000 upon the agreed terms at any time when Palmer signified that he "found the title to the property all right." Or, in other words, Palmer had an option to close the contract at any time he might inform Sullivan that he was satisfied with the title, provided however Sullivan had not revoked the standing offer.

This narrows the inquiry to the remaining element. Were the acts of Palmer in investigating the title and procuring the cash, such as to amount to an acceptance, and consummate the contract? There is no doubt but that had Sullivan been notified by Palmer of the approval of the title, before Sullivan took any further steps, the contract would have been sealed. Was such notification requisite? We believe it was.

What did Palmer mean when he said he would make the loan "if he found the title of the property all right?" Was this reserved condition one of law to be tried by a court, or of fact for a jury, or a question as to what title would move the conscience of a chancellor to grant specific performance; or was it a question to be determined by a mental process of Palmer, as to what title he would deem satisfactory to himself? There are "paper" titles, "good" titles, "perfect" titles, "legal" titles, "equitable" titles, "market able" titles, and other species of the genus *titulus*. There are titles which

will be held good in a court of law which will not support a bill for specific performance in equity. What were the requisites of a title found to be "all right," and who was to determine them?

"All right" is an idiomatic colloquial phrase, either adjectival or adverbial, expressive of satisfaction with, approval of, or assent to anything, and equivalent to quite correct or correctly, satisfactory or satisfactorily, in a satisfactory manner or condition: as, "your conduct or dress is all right." —Century Dict.

"Right," as an adjective has been defined as meaning fit; suitable; proper; correct, opposite to left."—34 Cyc. 1762.

"Right" as an adjective, "properly according with the conditions of the case; fit; suitable; becoming."—Standard Dict.

Let us substitute for "all right" some of these terms. He would make the loan if he found the title to the property "satisfactory;" "suitable;" "fit;" "becoming;" "proper," etc. And who is to determine its suitability or satisfactoriness? Palmer is thinking of safeguarding his own interests. If "*he*" Palmer, is satisfied that the title is such that he will be entirely secured in loaning the $5,000, *then* he will make the loan. He expressly stipulates that "*he*" is to be the judge.

And if, after examination, Palmer had decided that the title was not "all right," he could have refused to make the loan, and Sullivan would have been remediless. Probably, in this Palmer could not act out of mere caprice, but if he acted in good faith, however trivial the supposed cloud on the title, he was under no obligation. In Singerly v. Thayer, Thayer agreed to put in an elevator "satisfactory in every respect." The elevator being rejected after trial, Thayer recovered damages in the lower court, but the Supreme Court reversed the judgment, holding that the fair inference was that the elevator was to be satisfactory to Singerly, and while it could not be rejected for mere caprice, yet a *bona fide* objection by him to its working was a sufficient defence to the action.

Singerly v. Thayer, 108 Pa. 221.

Howard v. Smedley, 140 Pa. 81.

Boiler Works v. Schroeder, 155 Pa. 394.

Campbell Print Press Co. v. Thorp, 1 L. R. A. 646.

9 Cyc. 621.

Church v. Shanklin (Cal.), 17 L. R. A. 207.

And in Averett v. Lipscomb, 76 Vir. 404, where a purchaser bought property upon the condition that if not satisfied with the title he need not comply with the terms of sale, specific performance of the agreement was refused. "It is immaterial," says Burke, J. "that this court now considers that the vendors were and are able to make good title. That is not the question. The contract left it for the purchaser to determine for himself the matter of title. If, on examination, he was not in good faith satisfied with the title he was not bound. The bargain was at an end."

Hence we conclude that the condition reserved by Palmer was to be determined by his own mental process. And when this process was complete, if he wished to hold Sullivan he should have notified him. For, as quaintly remarked by Brian, C. J., in Y. B. 17 Edw. 4–1, "it is trite learning that the thought of man is not triable, for the devil himself knows not the thought of man."

Were the acts of Palmer in disposing of his stocks and bonds a sufficient evidence of his acceptance of Sullivans's offer? There is no evidence that Sullivan knew of such transaction, or even that by inquiry he could have ascertained such sale or that Temple's motive in selling the securities was to procure money for the loan. He surely was under no obligation to scrutinize Temple's conduct to discover whether the money would be forthcoming. An act may be the acceptance of an offer, but only where it is the specific performance of that for which the offeror has stipulated. Had Sullivan's proposal been, "If you sell your stocks in the A. and B. companies, I will consider the contract closed," Palmer's selling of such stocks would have been a sufficient acceptance.—Hoffman v. Bloomsburg Ry. Co. 157 Pa. 174; Carlill v. Carbolic Smoke Ball Co., 61 Q. B. 696; 9 Cyc. 271. (Note).

But here Sullivan had no means of knowing what the decision of Palmer after an examination of the title was, or even that Palmer had examined it. It was contended that Sullivan knew that he had a good title and therefore was bound to presume an acceptance. But his actions raise a strong contrary presumption, viz: that after waiting in vain for an answer from Palmer he concluded that Palmer had discovered some flaw or cloud. Therefore he sought elsewhere for the money.

Since his continuing offer was based on no consideration he could revoke it at any time. He waited until the last day for Palmer, but Palmer failed to communicate with him. Then he revoked the offer by negotiating the loan elsewhere and notifying Palmer.

The answer to the third question therefore is, that Palmer's actions *did not* constitute an acceptance, or consummate the contract.—Emerson v. Graff, 29 Pa. 358; Johnson et. al. v. Tressler, 7 Watts 48; Borland v. Guffy, 1 Grant 394; 9 Cyc. 271.

And we accordingly enter judgment for the defendant.

OPINION OF SUPERIOR COURT.

Sullivan asked Palmer for a loan upon a mortgage. Palmer then offered a loan of $5000 at 6 per cent interest, on two conditions: (a) that he should find the title to the land good on which the mortgage was to be placed; and (b) that Sullivan would undertake to take the money for the time—one year—and at the specified rate, and give the mortgage. To this Sullivan agreed. The loan was to be made no later than Jan. 1st, 1909. We have here an offer by Palmer; an acceptance of it by Sullivan; hence, a contract.

Neither Palmer bound himself to lend, nor Sullivan to accept the loan, unconditionally. The lending was to take place if the title to the land was found good. Palmer unconditionally bound himself to make the investigation, but what he should then do, was contingent upon the result of it. This contingency is not inconsistent with the nature of a contract. Multitudes of agreements affected with similar contingencies have been treated as contracts. Such contingencies have not been sufficient to prevent an offer, affected by them, from being converted by acceptance, into an obligatory transaction; into a contract.

The search into the title would be made by an expert, who would not

work for nothing. The expert actually employed by Palmer charged a fee of $10. It is easy to understand why Palmer would not undertake to have the search made, until he got the promise of Sullivan to take the loan if the result of the search should be to reveal the goodness of his title.

Conditional undertakings are not wanting in such mutuality as a contract implies. When the promises were exchanged, both parties became bound. Neither was as free as before. Before, Palmer could have parted with his money, or not, whether Sullivan's title was bad or good; he could have the search into it made or not, as he might choose. After, Palmer was bound to make the search; and he was further bound, if the title was "all right," to lend the money. If he had refused to make the probe, or making it, and finding the title "all right," had refused to lend the money, Sullivan could have recovered damages from him. To this duty of Palmer, that on Sullivan of taking the money, and paying 6 per cent interest on it for one year, and of then repaying the principal, was reciprocal.

We are not bound. we think, to so interpret the phrases employed by the parties, or to hold that Palmer put himself under a duty to lend, only if he should in fact be satisfied with the title, after an investigation into it. He probably had an interest in making the loan. The rate of interest stipulated. was higher than the prevailing rate. There is no probability that he was intending to retain an absolute discretion, whatever the result of his examination, as to making the loan, and even if he did have this intention, we cannot discover an intention that Sullivan should understand that he was reserving such discretion. Sullivan was needing the money so badly that he was willing to pay dearly for it. He would hardly be content with an arrangement that would leave him irremediably uncertain until the arrival of Jan. 1st, 1909, whether he would get the money or not. The contract must receive the interpretation which Palmer knew that Sullivan, under the existing circumstances, would place upon it.

The value of the mortgage would depend on the properties of the land, its size, its locality, its fertility, its improvability, but it would also depend upon the kind of interest Sullivan had in it. With the land, as such, Palmer was satisfied already. What he wanted to know was, whether as mortgagee he would get a good title in fee. Like any buyer of land he was interested in the marketability of the vendor's, the mortagor's estate. Evidently what the parties intended was, that the loan should be made, if the title is marketable; was such as a vendee would be compelled to accept. Whether a title was marketable or not, is an objective fact. It responds to objective tests. It is not determined by the caprice, the discretion, the option of the vendee. The facts pertaining to it are discoverable. They can be apprehended by a jury or a court, and a jury or a court or both, and not the parties, decide its value. We do not question that the parties had in mind such tests. Palmer employed an attorney to find whether the title was "all right." The attorney evidently found that it was.

But, even if Palmer had an uncontrollable discretion as to believing whether the title was good or not, and therefore was under no *obligation* to make the loan, he was under an obligation to make the search. He could exercise his discretion only after the search was made. Had he refused to make it, Sullivan would unquestionably have had an action for the dam-

ages from the sequent refusal to make the loan, a refusal that could not be founded, in that case, on a dissatisfaction with the title. This duty to make the search, and to expend money in making it, was a sufficient support to a duty on Sullivan to accept the loan.

"Options" are well known forms of contract. For a price A may give to B an option to buy land, a horse, a share of stock, at a designated price. B has the right, but has no duty, to buy. A is bound by the will of B. It would not be a distortion of the negotiation between the parties in this case, to regard it as a purchase by Palmer at the price of the attorney's investigation, of an option to make a loan to Sullivan of $5,000.

We have reached the conclusion that a contract was made which imposed the duty on Palmer to have a search made into the title of Sullivan to the land, and, on the result's being favorable to the title, to loan $5,000 to Sullivan upon his tender of a proper mortgage, and which put on Sullivan, the result of the search being favorable, the obligation to tender the proper bond and mortgage, and to accept the money, pay 6 per cent interest for one year upon it, and return it at the end of the year. It remains to discover whether anything has happened to discharge Sullivan from this duty.

The contract was made "in December, 1908." The loan was to date from Jan. 1st, 1909, that is, as we conceive, it was to be made possibly before, but not later than a convenient time on Jan. 1st. The contract was for the mutual advantage of the parties. It was virtually to sell money, (if the solecism may be permitted) at a certain high price. Whether the money should be lent, depended upon a fact which Palmer undertook to discover. We think it was his duty, having discovered the title good, to give notice thereof to Sullivan before the arrival of Jan. 1st, so that the latter would be able conveniently to have his mortgage and bond executed, in time to offer them early in that day, and further, to have the money ready to deliver to Sullivan early on that day. In a contract for the loan of money by a certain day, time is "of the essence." The borrower specifying the time, must be understood to need the money at that time. To get it 24 hours later might be useless to him. We think as the learned court below intimates, that it was Palmer's duty to make the investigation of the title promptly, and to apprise Sullivan of its result, in order that Sullivan's anxiety might be allayed, and that he might know that search elsewhere for the money was unnecessary. The burden is on the plaintiff to negative any undue delay; he has not done so. The afternoon of Jan. 1st, 1909 arrived, and Sullivan had heard nothing of Palmer's intention. Meantime, anxious possibly, lest the decision would be unfavorable, he had sought and found the money elsewhere.

Palmer had, it is true, apparently decided that Sullivan's title was good, and that he would lend the money. In order to obtain the money, he had sold various stocks and bonds, and "he was prepared to deliver the money on Jan. 1st." The learned court below appositely observes that Sullivan was not bound to know—and it does not appear that he did know—of these acts. Why he was kept in the dark for several days or weeks possibly concerning a matter of vast importance to himself is not explained. It was not unreasonable for Sullivan to expect notification before Jan. 1st if Palmer should decide to deliver the money, and to infer, from his not receiving

such notification, that Palmer had decided not to deliver it. He might, it is true, have taken the trouble to inquire, but we cannot see that he was under any duty to do so.

A word may not be inappropriate, concerning the measure of damages.

What we have said indicates that, in our opinion, Palmer can recover no damages, because of his not having duly notified Sullivan of his decision. Had there not been this obstacle to a recovery, what damages should be allowed? The investigation of the title was to be made by Palmer and for his own benefit. Sullivan did not promise to pay for it. Palmer expected to make a loan at 6 per cent interest, and therein was his motive. Palmer however had a contract which secured him 6 per cent for a year. He has been unable to make any other investment than a deposit in bank at 3 per cent. Had the suit been by Sullivan for Palmer's refusal to make the loan, Sullivan would have recovered as damages the difference between the interest which under the contract he would have paid, and the larger interest which he was obliged to pay, on borrowing the money elsewhere.—N. Y. Life Ins. Co. v. Pope, 68 S. W. (Ky.), 851; Turpie v. Lowe, 114 Ind., 37. "It is clear," says Sedgwick, Damages (622), "that a contract to loan money at less than the current rates of interest would give the right [to the borrower] to substantial damages." Palmer who was to get 6 per cent interest, has been unable to obtain more than 3 per cent. He would be entitled to $150 as damages if entitled to anything.

We close this too long decision with an expression of extreme satisfaction with the very lucid, learned, and ably conceived opinion of the learned court below.

Judgment affirmed.

STEVENSON V. COAL COMPANY.

Deposit of Culm on Land.

STATEMENT OF THE CASE.

In 1900 the X Coal Company erected a pile of culm near a stream on which Stevenson was a miller. In 1905 an ordinary flood washed a quantity of culm into plaintiff's dam and over his land. Stevenson bought in 1903 and he began this suit in 1907. Plaintiff had already gotten damages from other coal companies who had culm piles at other points along the stream.

COLLIER for Plaintiff.

FETTERHOOF for Defendant.

OPINION OF THE COURT.

GROVER, J.—The plaintiff has already gotten damages from other coal companies and brings this suit to recover damages from defendant company, which he claims were caused by the negligent act of the X Coal Company in erecting a culm pile so near a stream, on which plaintiff is a lower riparian owner, that an ordinary flood washed the culm down in plaintiff's dam and upon his land.

That a coal company is liable to lower riparian owners who may suffer damages as a result of the company placing culm or other refuse so near a stream as to be washed down by an ordinary flood is supported by abundance of authority: Little Schuylkill Navigation Company v. Richard's Admr., 57 Pa. 142; Elder v. Lykens Valley Coal Co., 157 Pa. 490; Lentz v. Carnegie Bros., 145 Pa. 612; Gallagher v. Kemmerer, 144 Pa. 509.

That the plaintiff has already gotten damages from other coal companies which contributed to the injury can in no wise affect his case, for in Gallagher v. Kemmerer, 144 Pa. 509, it was held that when an injury as a whole to lands, is the consequence of independent acts of trespass on the part of two or more persons, each act is a distinct cause of action for the portion of the injury resulting from it, and together they do not constitute a joint trespass. Other authorities to the same effect are, Seeley v. Alden, 61 Pa. 302; Little Schuylkill Company v. French, 81 Pa. 336.

Had it required an extraordinary flood to wash the culm in plaintiff's dam the result would have been different even though he had brought his action at the proper time.

One may deposit culm on his own land where it will be safe from encroachment by ordinary floods, and if washed away by an extraordinary flood he will not be liable for damages caused thereby.—Lentz v. Carnegie Bros., 145 Pa. 612.

Another important question in this case is as to when the right of action arose. Was it at the time the culm was erected by the X Coal company or was it at the time the culm was deposited in plaintiff's dam and upon his land. In reviewing the authorities we find it was at the time when the culm was erected by the X Coal Company. And more than six years have elapsed since that time. If the right of action arose when the culm was erected and that statute continued to run up to the time this action was brought, then the plaintiff's right to bring suit is barred. But, if the right of action arose at the time the culm was deposited in plaintiff's dam then he is in time and may recover.

It is a well settled rule of law that the right of action occurs when the culm is erected near the stream and not when deposited in plaintiff's dam as claimed by him. In Little Schuylkill Navigation Company v. Richard's Admr., 57 Pa. 142, the court said, the right of action began with defendant's act upon his own land. This is the tort, while the deposit in the basin below, is only the consequence. Another authority to the same effect is Noonan v. Pardee, 200 Pa. 474.

In Hogan v. Kurtz, 94 U. S. 772, it is held that when the statute of limitations begins to run, it will not be arrested by any subsequent disability; and a party claiming the benefit of its exceptions, can only avail himself of the disability which existed when the right of action first accrued. There being no disability that plaintiff could take advantage of, he can claim no exception. When he bought the land he took it subject to all existing equities between his grantor and the X Coal Company, and it must be presumed that he knew of the culm near the stream when he purchased, and even though he had no such knowledge it will avail him nothing, for in Noon v. Pardee, 200 Pa. 474, it is held that though one may be ignorant of his rights, yet the statute will run against him.

Williams on Real Property, Vol. 2, at page 252, says, that if there be several adverse occupants the last may tack the possession of his predecessor to his, so as to make a continuous adverse possession for the period required by the statute, provided there is a privity of possession between such occupants. Here there are such occupants. Here there is privity. Another authority to the same effect is Schrack v. Zubler, 34 Pa. 38.

Under all the circumstances of the case, we conclude that the plaintiff's right of action is barred by the statute of limitations.

OPINION OF SUPERIOR COURT.

The decision of the learned court below is revolutionary. It amounts to the proposition that where one does upon his own land an act which may in the future cause injury to another the statute of limitations begins to run from the time the act is done and not from the time the injury occurs.

If this is the law in regard to the piling of culm, it would apply to other acts as well. Applying this doctrine it would be necessary to hold that if a man procured and kept a vicious dog which subsequently bit some one the statue of limitations would begin to run at the time the dog was first procured. It would be necessary to hold that where one built an unsafe sidewalk which caused another to fall, the statute would begin to run from the time the sidewalk was built and not from the time of the fall. If the right of action arises at the time the sidewalk is built in whose favor does it exist? In favor of every inhabitant of the town? or ward? or resident of the street? What is the measure of damages?

If the right of action arises when the culm is piled near the stream, in whose favor does it arise? A flood may wash the culm upon the land of any one of a number of riparian owners. Does a right of action accrue to each of the owners as soon as the culm is piled? What would be the measure of damages in such an action? Would it be a bar to subsequent action to recover damages for the injury actually done when the culm was washed down? Has such an action ever been brought in the courts of Pennsylvania?

The difficulties presented by these questions have convinced us that the doctrine announced by the learned court below is erroneous and that the statute of limitations began to run only when the culm was deposited in the dam and over the land of plaintiff.

It may be that this is in conflict with the decision in Noonan v. Pardee, 200 Pa. 474. This court does not intend to extend the operation of this decision. In Noonan v. Pardee the court said that the cause of action was the failure to afford sufficient support and that it arose when the coal was removed without leaving sufficient support. The objection to this decision is that the support was sufficient up until the time the "cave-in" occurred. As soon as the support became inadequate the "cave-in" would follow as a necessary consequence.

In A. & E. Encyc. Vol. 19, p. 195, the law is stated as follows: "Where the act complained of might or might not be injurious and the plaintiff's right of action must depend upon its proving injurious the cause of action

cannot be considered as accruing until the injury has developed and until then the statute does not begin to run."

In 25 Cyc. 1135, it is said:

"The test to determine when the statute begins to run against an action sounding in tort is whether the act causing damages does or does not of itself constitute a legal injury, that is, an injury giving rise to a cause of action because it is an invasion of some right of the plaintiff. *If the act is of itself not unlawful in this sense, and the plaintiff sues to recover damages subsequently accruing from, and consequent upon the act, the cause of action accrues and the statute begins to run when and only when the damages are sustained; and this is true, although at the time the act is done it is apparent that injury will inevitably result.* But if the act of which the injury is the natural sequence is of itself a legal injury to the plaintiff, a completed wrong, the cause of action accrues and the statute begins to run from the time the act is committed, be the actual damage however slight and the statute will operate to bar a recovery not only for present damages but for damages developing subsequently and not ascertainable at the time of the wrong done, for in such case the subsequent increase in the damages resulting gives no new cause of action."

In support of the first part of the statement Hanna v. Holton, 78 Pa. 334, may be cited. The facts were as follows: Plaintiff in 1860 assigned to defendant as collateral security for a loan a judgment against J, which expired 1863. Defendant neglected to revive the lien and in 1866 J sold his land, so that the lien was lost. J was solvent at the time of the sale but afterwards became insolvent. It was held that the statute of limitations began to run from *the time of the sale and not from the time when the lien expired.*

It is true that the statute of limitations begins to run from the time the cause of action accrues. But when did the action accrue in this case? The act of the defendant was the piling of the culm on his own land, but that, in itself, alone did not harm the plaintiff. The plaintiff could not sue for damages for that though he might have asked for injunction relief. Later on damage is done the plaintiff by the washing down of the culm. The piling of the culm was the remote or primal cause,—the *causa causans*—in the line or process of the production of the injury; but the overflow consequent upon it is the direct cause of harm—the gravamen of the action. We hold therefore that the cause of action accrued and the statute began to run when the damage was sustained by the plaintiff and not when the causes were first set in motion ultimately producing injury as a consequence.

Judgment reversed with a v. f. d. n.

COMMONWEALTH V. GOLIGHTLY.

Larceny—Passing Counterfeit Money—False Pretense.

STATEMENT OF FACTS.

Farley, a livery stable keeper, instructed his hostler, Lightner, to take a certain horse to Newville and sell it to Golightly, provided that

Golightly would give two hundred dollars in cash. Golightly tendered Lightner counterfeit money for the horse and after being assured by Golightly that it was good money Lightner delivered the horse to Golightly. Golightly immediately took the horse to Carlisle and sold it.

REICHELDERFER for Commonwealth.
UMBENHAUER for Defendant.

OPINION OF THE COURT.

HANKEE, J.—This is an indictment for larceny. According to Trickett on Criminal Law in Pa. (Vol I, page 2) "Larceny is the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place with a felonious intent to convert them to his (the taker's) own use and make them his own property, without the consent of the owner".—1 Crim. L., section 862.

In 119 Pa. 254, Com. v. Eichelberger, it is held, that if by means of any trick or artifice the owner of property is induced to part with the pssession only, still meaning to retain the right of property, the taking by such means will amount to larceny provided it be done *animo furandi.* But if the owner part with not only the possession of the goods, but the right of property in them also, the offence of the party obtaining them will not be larceny, but the offence of obtaining goods by false pretence. According to the facts of this case, we do not know whether Golightly, the defendant, knew that the money he tendered was counterfeit, at the time he offered it, or whether it was discovered to be counterfeit after the transaction had been completed. But even admitting he knew it at the time, according to the above-cited case, he would not be guilty of larceny, because the owner, through his agent, parted with the possession and right of ownership when the money was paid. If the possession and title to personal property are voluntarily given to another, no matter how gross the fraud by which the owner may have been persuaded to do so, there is no larceny. This principle was recognized in 2 Phila. 385, where it is said that, "if he consent to abandon his property in article though he may have been deluded by gross fraud, the taking is not larceny."

In this case, it is true that, admitting the defendant knew the money to be counterfeit, he deceived the vendor, but, nevertheless, he obtained his consent to an *absolute* sale, and possession of the horse was delivered to him accordingly. There was no condition in the case. The prosecutor might argue that it might be equally criminal to prevail on the owner to part with the property in as well as the possession of goods, by fraud and falsehood, but the law does not furnish actions according to the degree of immorality.

The prosecutor might argue that the consent of the vendor was fraudulently obtained and therefore in law was no consent; and the defendant, without paying for it, was guilty of larceny. In 15 S. & R., 92 Lewer v. Com. it is held: "It is not constructive larceny, if one by fraudulent means induces another to part with the property in goods and to deliver the possession of them absolutely." "When the owner of goods is induced by fraudulent representations to part not simply with the pos-

session but with the ownership, and possession is given in consequence of this intention to part with the ownership, the taking of the thing is not larceny, but the obtaining of goods by false pretences.—Trickett on Pa. Criminal Law, Vol. I, 388. The jury will therefore render a verdict in favor of defendant.

OPINION OF SUPERIOR COURT.

The transaction between Farley and Golightly was a sale of the horse for $200. Farley intended to sell; Golightly intended to buy. The possession of the horse was given to Golightly, as the buyer, in execution, in part, of the sale. The crime of Golightly, therefore, if crime he committed, was not larceny.

He delivered counterfeit money to Farley's agent, in payment of the horse. Did he know that it was counterfeit? If he did, and the money was coin, he violated the 160th section of the act of March 31st, 1860, I Stewart's Pardon 922; which declares that any person who passes or puts off any counterfeit coin "knowing the same to be false or counterfeit," shall be guilty of a misdemeanor. If the money purported to be national currency or bank notes, the passing of it, with knowledge that it was fictitious, was also a misdemeanor.

If the passing with knowledge of false money is not exclusively punishable by the statutes, the passing thereof in the effecting of a purchase would doubtless be an obtaining of the thing purchased by false pretense. "The passing of counterfeit money," says McClain, I Crim. L. 681, "is an offense in itself, and is perhaps not punishable [for that reason, he means] as a false pretense. But if the bill or coin does not really purport to be money, but is only in semblance of money, then the use of it might constitute the offence of false pretense. Undoubtedly the use of counterfeit money, whether coin or bank bills, would in every instance, be a false pretense unless it is punishable as a higher crime." Cf, also, 2 Wharton Crim. L. 69.

It does not appear, however, that Golightly knew that the money he tendered for the horse was counterfeit. He could therefore not be convicted of either passing counterfeit money, or of obtaining the horse by false pretenses. Knowledge of the falseness of the pretence is indispensable to its criminality.—1 Trickett Crim. L. 59.

The learned court has properly held that there could be no conviction of larceny.

COMMONWEALTH V. TALBOT.

Larceny—Theft of Note—Maker's Equities no Defense.

STATEMENT OF FACTS.

William Brainard obtained from Harry Tanden a note for $500, payable to Brainard by falsely representing to Tanden, who was illiterate, that it was a notice to Tanden's tenant to vacate premises. Brainard assigned this note for $475 to Alford, who had no knowledge of the cir-

cumstances under which it was procured. Talbot took the note from Alford without Alford's knowledge. He is now on trial for larceny of the note. Defendant asks the court to charge the jury that there can be no conviction.

SMITH for Plaintiff.
PUDERBAUGH for Defendant.

OPINION OF THE COURT.

ROOKE, J.—This was an indictment for larceny and the defendant asks the court to instruct the jury that there can be no conviction.

In order to ascertain whether the defendant can be convicted of the crime charged, it will be first necessary to ascertain what larceny is.

Larceny has been defined to be the taking, by trespass, of property which belongs generally or specially to another, with the intent to deprive the owner thereof permanently.

The defendant's contention is that, owing to the fraud of the payee in procuring the note, Alford acquired no property right in the note of which he could be deprived by the defendant.

To give Alford a right of action against Tanden, he must be a *bona fide* purchaser for value, before maturity, and without notice of any defect in Brainard's title, as we must assume that this was an ordinary promissory note and in the usual form.

Notice of defect, according to section 56 of the negotiable instruments act of 1901, is defined as follows: To constitute notice of the infirmity in the instrument or defect in the title of the person negotiating it, the person to whom it is negotiated must have actual notice of the infirmity or defect, or knowledge of such facts, that his action in the taking of the note amounts to bad faith.

While the facts do not state the period for which the note was to run, we assume that Alford purchased the note before maturity. It is also evident that he paid value ($475) for it, and had no knowledge of the defect in Brainard's title. He was, therefore, a *bona fide* purchaser, for value, before maturity, and without notice.

It is well settled by the authorities in Pennsylvania, that a person who has been induced to sign a note by the fradulent misrepresentations of the payee or of a third party, cannot set up such fraud as a defense, to defeat a recovery by a *bona fide* purchaser for value, before maturity, and without notice.—Rothermal v. Hughes, 134 Pa. 510; Phelan v. Moss, 67 Pa. 59; Moorhead v. Gilmore, 77 Pa. 122; 84 Pa. 446.

It is clear from the above that Alford had a right of action against Tanden on this note and consequently a property right in the said note.

At common law one could not be convicted of larceny for the taking of a note. This, however, was remedied in Pennsylvania by the act of March 31, 1860, the provisions of which are as follows: "If any person shall steal any bank-bill, note, check, draft etc., he shall be guilty of larceny."

In Commonwealth v. Yerkes, 119 Pa. 269 the Court said: "Our criminal code, section 104, has expressely made it larceny to steal checks and other securities, so that at the present time, a check is as much property

as a horse or a bale of goods and is to be treated, not as a mere piece of paper, but as a representative of money, which it calls for, and of a corresponding value. This case is to be considered precisely as if the defendant, instead of obtaining a check, had obtained the money from the city treasurer. The moment a maker has filled out a check and signed it so as to enable the holder to draw the money which it calls for, its value attaches and it becomes property, the stealing of which is larceny."

The question of the stealing of checks and notes being included by the legislature in the same paragraph of the same act, it is manifest that what the learned judge above states in regard to checks is equally applicable, in the present case, to this note,

Alford, having a property right in this note, was deprived of the same by Talbot and in view of the authorities above cited, the court declines to charge the jury that there can be no conviction.

OPINION OF SUPERIOR COURT.

The defendant is on trial for the taking of a "note for $500." The act of March 31st, 1860, declares that any person who shall "steal any * note * * * * or promissory note for the payment of money * * shall be deemed guilty of larceny."

But it is said that the note must be at the time of the taking, a legally valid and subsisting security for the payment of money (1 Wharton, Crim. Law, 767) or that it must be such that it will become a security by the act of passing from him to another.—1 Wharton Crim. Law 768; 1 McClam Crim. L., 534; Cf. Sylvester v. Girard, 4 R. 185; Wilson v. Porter (Ala.) 118.

Was the Tanden note in the hands of Alford, a valid security? It was executed by Tanden, who was illiterate, by a representation that it was a notice to his tenant to vacate certain premises. It is clear that Brainard could not have enforced payment of it.—Schuylkill County v. Copley, 67 Pa. 386; McAboy v. Johns, 70 Pa. 9; 3 P. & L. Dig. Decisions 4040.

Brainard "assigned" the note to Alford. It does not appear that he endorsed it. "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to * * order it is negotiable by the indorsement of the holder, completed by delivery."—Negot. Inst. Act of 1901, § 60. "Where the holder of an instrument payable to his order, transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferrer had therein, and the transferee acquires, in addition, the right to have the endorsement of the transfer. But, for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the endorsement is actually made."—Negot. Inst. Act, of 1901, § 79. Brainard has never indorsed the note, and hence Alford has merely the rights which Brainard had; that is, he could not have compelled the payment of any thing.

But, even had Brainard endorsed, we are inclined to think that Alford's right would have been no better than Brainard's. Fraud, like duress, failure of consideration, etc., is, in many of its forms, only what is known, sometimes as an equity, as a personal defence; good against

endorsees with notice, or who have paid nothing for the note, but bad against endorsees *bona fide* and for value. That form of fraud, however which consists of misrepresentation to an illiterate person, of the import of the paper according to which it is not a negotiable instrument and the securing of his execution of it, without his being negligent, by reason of this misrepresentation, is held in some jurisdictions to constitute a real as contrasted with a personal, defence, that is, to be available against any holder, although *bona fide* and for value.—Foster v. Mackinnon, L. R. 4 C. P. 704; Bigelow, Bills, Notes & Checks, 205; 1 Daniel, Negot. Inst. 859 *et seq.* This principle has been applied in this state, in Mercur v. Schwankie, 4 Leg. Gaz. 99; 14 P. & L. Dig. Decisions, 23758.

It does not, however, seem to be necessary that the instrument stolen should be capable of being enforced. A bank or other note or check before issue may be stolen. Its enforceableness subsequently arises if at all, but an action by any body can be defeated by proof of the theft. Yet it has been held larceny.—Com. v. Yerkes, 119 Pa 266; 1 McClain's Crim. L. 534; 1 Wharton 768. The wrong done by such larceny, is in exposing the maker of the note to the risk of a successful action. The stealing of contracts, receipts, etc. is made larceny, for the reason evidently that it will embarrass parties who desire to enforce rights, or defend against claims, in establishing such rights or defences. The note stolen by the defendant *prima facie* proves its holder entitled to money from the maker. The holder has a right to it, as evidence of his demand. Whether he will succeed on it or not, ought not to be litigated in a prosecution for the theft of it. He has been deprived of the power to use it as evidence of his claim. He has been put to the risk of losing this claim—whether disputable or not ought not to matter—by its reaching, without his co-operation, a *bona fide* purchaser from the thief. It ought to have been, it probably was, the aim of the legislature, in criminalizing the stealing of receipts, letter-books, etc., to protect the possession of the persons having such instruments of proof, from the loss of it, and the criminalty of the act of taking them ought not to depend on the opinion which the court may form, in the trial of the indictment, as to whether, had the thefts not occurred, the party from whom the document was stolen, would or would not have prevailed by means of it in a civil action upon it. The cases are not harmonious, and they exhibit no consistent principle. The right of Alford to contest the value of Tanden's alleged defence had value, and if it was the legislature's intention to protect this right, from embarrassment by theft, its intention would be sensible. We shall impute to it such an intention.

Judgment affirmed.

O'BRIEN V. BARNETT AND C. V. R. R.

Right of Stoppage *in Transitu*—Transfer of Bill of Lading—*Bona Fide* Holder.

STATEMENT OF FACTS.

Barnett sold a lot of goods to Cope on credit of thirty days. He

shipped the goods by freight consigned to Cope or order and mailed Cope the bill of lading. On the arrival of the bill of lading, Cope went to O'Brien and offering the bill of lading as security, asked for a loan of $500 for sixty days. The loan was made but O'Brien first inqeduir whether the goods were paid for. Cope stated that they were not paid for and further that he did not think he ever would pay for them. Cope further stated that he owed his wife $500 and that he was borrowing this sum from O'Brien that he might square accounts with her. Cope was not insolvent at this date but the next day he suffered a heavy loss by fire and the day following he made an assignment for the benefit of his creditors. Barnett notified the carrier to hold the goods. O'Brien, the endorsee of the bill of lading brings replevin.

WOODWARD for Plaintiff.
ZERBY for Defendant.

OPINION OF THE COURT.

COHEN, J.—The first point to be considered by this court is as to whether a consignee can pass title to property by the delivery of the bill of lading. It is a well settled principle of law that the consignee can pass a good title by indorsing his bill of lading over to another and the act of 1866, Stuart's Purdon's Digest, 393, Vol. I, says, in substance, that bills of lading shall be negotiable and may pass title, and in 89 Pa. 155, and 87 Pa. 525 it is held that bills of lading pass title to goods in transit as effectually as if the goods themselves were delivered. "The endorsement of a bill of lading by factors or consignees is as effective as that of the vendor in giving validity to any contract or agreement by way of pledge, lien or security *bona fide* made by any person with such vendee or agent, as well for any original loan, advance or payment made upon the security of such goods or documents (including bills of lading) as also for further advances, and such contract or agreement shall be binding upon and good against the owner of such goods." Benjamin on Sales, Vol. II pages 1101-1102. Therefore the plaintiff in this case took good title to the goods.

Did the right of stoppage in transit cease when Cope assigned the bill of lading to O'Brien, the plaintiff? If O'Brien was a *bona fide* purchaser for value of the bill of lading then it is the opinion of the court that the right of stoppage *in transit* had ceased to exist. Benjamin on Sales, Vol. II, page 1101, says "the right of stoppage will be defeated by the assignment of the bill of lading" and this is the doctrine of 86 N. Y. 167 and Schumacker v. Ely, 24 Pa. 521, *provided* that the assignee is a *bona fide* purchaser for value.

The only question that remains is whether O'Brien was a *bona fide* purchaser for value of this bill of lading. We think that O'Brien was a *bona fide* purchaser for value without notice. Mr. Benjamin, in his work on Sales, page 1110, says in his remarks concerning bills of lading, "the transfer of a bill of lading in order to affect the vendor's right of stoppage *in transitu* must be, both by statute and by common law, to a *bona fide* third person" and adds "this means not without notice that the goods have not been paid for because a man may be perfectly honest in dealing for goods that he knows not to have been paid for, but

without notice of such circumstances as render the bill of lading not fairly and honestly assignable." Now there is no doubt here that the plaintiff acted honestly, for at the time he took the bill of lading he paid full value and he knew that Cope was perfectly able to pay and knew that Cope was solvent and could have been forced to pay at that time. True, the vendee, Cope, made certain remarks as to not having paid, nor would he pay for the goods, but it was not incumbent upon the plaintiff to heed those remarks, nor does that show an element of fraud. "Mere knowledge on the part of the transferee that the buyer has not paid for the goods will not defeat his right as against the seller."—26 A. & E. Encyc. 1111, also held in Shepherd Morse Lumber Co. v. Burroughs, 62 N. J. L. 469. There evidently was no fraud in the transfer for surely O'Brien had no reason to know that Cope would become insolvent and it was only through force of circumstances that Cope was compelled to make an assignment for the benefit of his creditors. For who can tell when fire may cause the insolvency of a person? We think that O'Brien acted with all the fairness, honesty and prudence that one could expect, and is such a *bona fide* holder for value as to give him a superior equity as between the parties here.

We do not consider it necessary for the court to inquire into the fact as to the disposition of the $500 that the plaintiff gave to Cope, for that is immaterial. It would be disastrous to all commercial transactions to hold a lender to a responsibility to see that the use of the money loaned was a proper or even legal one and it was not the duty of O'Brien to find out to what use that money was put.

We have arrived at the conclusion that the plaintiff in this case acted innocently and was a *bona fide* purchaser for value within the meaning of the law governing the transfer of bills of lading.

And therefore judgment is entered for the plaintiff.

OPINION OF SUPERIOR COURT.

That the title of Cope passed to O'Brien, for the purpose of a security, is well shown by the learned court below. The goods may have been worth $1,000. They were transferred as a species of pledge, for the repayment of a loan of $500. Cope's right to the possession of them, whatever it was, passed to O'Brien.

The goods were still *in transitu* when Cope became insolvent. The vendor could then have stopped them, but for the prior transfer of them. That prior transfer prescinded the right of stoppage, if O'Brien was a *bona fide* purchaser for value.—Tiffany, Sales, 333. He was a purchaser for value. He lent $500 on the security of the goods. Did he purchase them *bona fide?*

The goods had not been paid for by Cope, but this gave no right of stoppage, even as against Cope *a fortiori*, as against O'Brien. O'Brien's knowledge of the fact would not put him in a worse plight than Cope's knowledge of it.

Was the sale to Cope voidable by the vendor for any other reason than his insolvency, and that he had not paid for them? While the negotiation of a bill of lading is equivalent to a negotiation of the goods, it is not better than the latter. If, at the time of the transfer by Cope, Bar-

nett had a right to rescind the sale, and the facts conferring this right were made known to O'Brien when he made his loan, the right of rescission would be available against O'Brien.

The goods had not been paid for and O'Brien knew so. But the non-payment would not justify a rescission as respects Cope, nor the knowledge of it, as respects O'Brien.

Cope told O'Brien not only that the goods were not paid for but that he "didn't think he ever would pay for them," that he was not designing to use the money he obtained from O'Brien, in paying for them. May we infer from this that he intended, at the time of buying from Barnett, not to pay him? Hardly. Not to think, a week after buying goods, that one would ever pay for them, though then able to pay for them, would justify a suspicion, at least, that the intention not to pay for them was then present, and this would warrant the suspicion that if present then, it was present when the sale was made. But it would scarcely authorize more than a suspicion.

When A inquires of B the price of a thing, and says he will take it at that price B, if unsophisticated by the lore of lawyers, will think that A intends B to believe that he is promising to pay the price. That intentions are important is witnessed by thousands of events. Many acts are criminal solely because of the intent. The intent to do an act at a future time, is recognized in the criminal law, as well as the civil, as making it more or less probable that the act will be done. The ordinary lender of money thinks that if the borrower intends, at the time of borrowing, to repay the loan, he will be more apt to do so, than if he does not so intend, The lender would in few cases, make the loan, if he knew that the borrower either intended not to repay him, or did *not* intend to repay him. When a man misrepresents his intention to pay, he misrepresents a material, a very material fact. If the purposed misrepresentation of other material facts is a fraud, so is that of intention. The hair-splitting discussion of Lowrie, J., in Smith v. Smith, 21 Pa. 367, may have satisfied himself with its astuteness. It hardly imposes on the sane and unperverted moral sense and judgment of men who are not professional casuists. "The intention not to pay is dishonest," says the Justice, "but it is not fraudulent." A consolatory distinction surely! Something might have been said for the doctrine that to know that when one purchases goods on credit he is insolvent, is not the same as to intend not to pay for them, for insolvent men make many payments, and the buyer who buys goods for the purpose of selling them, may intend from the proceeds of their sale, to pay for them, even though he is insolvent: In Rodman v. Thalheimer, 75 Pa. 233, the doctrine laid down is that "insolvency and the knowledge of it" at the time of a purchase on credit is not a fraud for which the sale can be annulled. The strictures of Justice Mitchell in Baughman v. Central Bank, 159 Pa. 94, on the doctrine of Smith v. Smith are apt and deserved, and it is a pity that the court did not feel then disposed to banish it from the law of an honest state. In 1837 Rogers, J. was convinced "that when a person purchased goods with a preconceived design of not paying for them, it is a fraud, and the property of the goods does not pass to the vendee."—Mackinley v. Mc-

Gregor, 3 Wh. 369. Lowrie, J., might well have been convinced of it in 1853, as Mitchell, J., was in 1893.

We should have held in the interest of fundamental honesty that had it appeared that Cope, when he bought the goods, intended not to pay for them, Barnett could have rescinded the sale, and that this right of rescission would avail against O'Brien, if when he bought from Cope he knew of the fraudulent attitude of Cope in his dealings with Barnett. The evidence is not clear of the existence of the knowledge of this attitude. The learned court below has reached a proper decision, supported by a clear and terse opinion.

Judgment affirmed.

PURDON V. KRESS

Trespass—Drunkenness—Personal Injury.

STATEMENT OF FACTS.

Kress was returning home on Nov. 1st, 1909 in an intoxicated condition. He fell in front of the gate to Purdons's yard and finding himself unable to get up he crawled into Purdon's yard to avoid attracting attention from persons passing, intending to remain till he should recover from his intoxication sufficiently to get home. After dark Mrs. Purdon having occasion to go into the yard, fell over the unconscious form of Kress and broke her arm in the fall. Purdon was a lessee of the property on which the accident occured. Mrs. Purdon was not a party to the lease. This is trespass by Purdon and wife each claiming $5,000.

MAUCH for plaintiff.

BUTLER for defendant.

OPINION OF LOWER COURT

ZERBY, J.—There is no question as to the liability of Kress in this action if the action is properly brought. It has been decided time and again by the Supreme Court of this Commonwealth that in trespass, the *quo animo* is not material to the question of liability and it is no excuse that the trespasser was an infant or insane or intoxicated, if his intoxication was due to voluntary excessive drinking. This is the state of facts in this case.

In 78 Pa. 407 Paxon says, "the law is well settled that persons not *sui juris* and who have no general capacity to contract debts, are nevertheless liable for their torts.

By inference in Wilt v. Welsh 6 Watts 9 an infant is liable for its torts.

Therefore how much more liable for their torts are intoxicated persons who voluntarily put themselves into such a condition that is conducive to wrongful acts.

In the case of Sullivan v. Murphy, 2 Miles 298, column 37.484 volume 21 of Pepper and Lewis Digest of Decisions it was held that if the up-setting of scalding water over the plaintiff was due to no improper conduct

on the part of the defendant, he was not liable, but if the fall was due to intoxication from voluntary drinking to excess, he was liable.

As to the right of action against Kress by the husband and wife, section 1 Act May 8, 1895 P. L. 54 enacts: Whenever injury not resulting in death, shall be wrongfully inflicted upon the person of the wife and a right of action for such wrongful injury accrues to the wife and also to the husband, these two rights of action shall be redressed in only one suit brought in the names of husband and wife, and it was held in 201 Pa. 181 that this section is compulsory and only one suit can be brought. And in 14 Sup. Ct. 421 page 422 "it was held that the proper procedure under this act results in a separate verdict and judgment in favor of each plaintiff, if both recover." The manifest advantages of the procedure are, that it saves expense, and, more important, prevents the possibility of a double recovery of damages resulting from the failure of the jury to appreciate the distinctions between the measure of damages in the husband's case and the measure in the wife's case. Held that the wife is entitled to recover an allowance for the pain and suffering which she had undergone and is liable to undergo by reason of the injury, but she is not entitled to any compensation for any pain or suffering which are purely mental. And this seems to be the law in this State as decided by many decisions.

Now the question arises, what right of action, if any, has the husband? Does he have any? We think he does. In 24 Super Ct. 27 page 31, it was said that a husband has right to compensation for the aid, assistance, comfort and society which his wife would be expected to render him if she had not been injured by the act of the defendant and this without proving the value of the aid assistance, etc. in dollars and cents and this regardless that the wife is entitled to her separate earnings under our married woman's acts. In both cases it is a question for the jury under proper instructions.

Here Purdon was in actual possession and it has been held by a long line of cases in this state that the action *quare clausum fregit* is founded upon possession of the land and not upon the right of property in it and can be sustained only by the person who has actual possession when the injury was committed; 25 Pa. 186, 2 Pa. 289, 2 Yeates 210.

The domicile of the wife follows that of the husband, she is on the premises with his permission and any injury to her caused by negligence of another is redressable in an action by her.

Therefore the plaintiffs are entitled to such damages as the jury under proper instructions shall award.

OPINION OF SUPERIOR COURT.

Two questions are presented for consideration: (1) Would Kress be liable if he had been sober. (2) If so, does the fact that he was drunk excuse him?

The fact that a man is a trespasser does not render him liable for any injury to which the fact that he was a trespasser may have contributed as a remote contributing cause or condition. He is only liable for injuries which are the natural and probable consequences of his acts. The ordinary rules as to proximate cause, etc., apply as well to the case of a trespasser as to any other person.— Thompson on Negligence 60; Hol-

lenbach v. Johnson, 29 N. Y. Supp. 945; 28 A & E. 609; 46 Century Dig. 459. It is true that in Schumaker St. Paull. 46 Minn 39, 12 L. R. A. 257, it is said, "He who commits a trespass must be held to contemplate all the damages which may legitimately flow from his illegal act whether he may have foreseen them or not" and that, "Whoever commits a trespass or other wrongful act is liable for all direct injury resulting therefrom, although such resulting injury could not have been contemplated as a probable result of the act done." But in the next sentence the court said: "The damages cannot be considered too remote, if according to the usual experience of mankind injurious results ought to have been apprehended." This is the ordinary rule as to proximate cause;—21 A & E. 486.

The question, therefore, arises: Was the injury to Mrs. Purdon the natural and probable consequence of Kress' act? This would depend upon where Kress was lying. If he was lying in a remote and unfrequented part of the yard Mrs. Purdon's injury would probably not be regarded as the natural and probable consequence of his act. If, on the other hand, he was lying upon the path which led from the house to the street the fall of Mrs. Purdon and the consequent injury would undoubtedly be the natural or probable consequence of his act.

The exact spot at which Kress was lying does not appear. It does appear, however, that it was *dark* and that the plaintiff was a *woman* and that *she had occasion* to go into the yard. It is not likely that a woman would go into an unfrequented or remote portion of the yard after dark. It is more probable that the place to which she was going was a place to which she was accustomed to go. Moreover, Purdon was very drunk and crawled into the yard from the street. It is highly probable that he did not crawl far from the gate.

At any rate the question of negligence is ordinarily a question for the jury. If there is a reasonable doubt as to the facts or the inferences to be drawn from them it is the province of the jury to determine it.—Howeth v. P. W. & B. R. R., 166 Pa. 607; P. & L. Dig. Dec.; Vol. 13, col. 21733 and cases there cited.

In the present case there was such a doubt as to the facts and the inferences to be drawn therefrom as to justify the court below in submitting the case to the jury.

The fact that Kress was intoxicated does not excuse him. The fact that a tort was committed while a defendant was intoxicated is no excuse whatever.—Cooley on Torts 63; Jaggard on Torts 165, and cases there collected.

In Sullivan v. Murphy 2 Miles 293 the facts were as follows:

Sullivan was sitting in a bar room near a stove on which was a vessel containing several gallons of hot water. Murphy and several others entered the room and drank some brandy. Murphy stepped back in order to allow others to approach the bar and in doing so stumbled and fell against the stove and upset the water on Sullivan. In an action brought by Sullivan the court charged that if Murphy's fall was an accident due to no fault, negligence or improper conduct on his past he was not liable but that if his fall was due to intoxication from voluntary drinking to excess he was liable.

Judgment affirmed.